

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 22, 2008

DONATHON J. TEARS v. STATE OF TENNESSEE

Appeal from the Circuit Court for Marshall County
No. 17664 Robert Crigler, Judge

No. M2007-02839-CCA-R3-PC - Filed December 22, 2008

The petitioner, Donathon J. Tears, appeals as of right from the Marshall County Circuit Court's denial of his petition for post-conviction relief. The petitioner seeks relief from his convictions for three counts of sale of cocaine for which he received an effective sentence of twenty years. He alleges that his guilty pleas were involuntarily and unknowingly entered due to the ineffective assistance of counsel. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which DAVID H. WELLES and THOMAS T. WOODALL, JJ., joined.

Hershell D. Koger, Pulaski, Tennessee, attorney for appellant, Donathon J. Tears.

Robert E. Cooper, Jr., Attorney General & Reporter; Sophia S. Lee, Assistant Attorney General; Charles Frank Crawford, Jr., District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, attorneys for appellee, State of Tennessee.

OPINION

The record reflects that the petitioner entered guilty pleas on October 16, 2006, to three counts of sale of more than 26 grams of cocaine and received sentences of ten years for each conviction. By agreement, one sentence was imposed consecutively to the other two concurrent sentences for a total effective confinement of twenty years. On July 24, 2007, the petitioner filed a post-conviction petition alleging that his convictions were the result of involuntary and unknowingly guilty pleas caused by the failure of the trial court to fully advise him of his rights and the ineffective assistance of counsel. After the appointment of counsel, amendment of the petition and a full evidentiary hearing, the post-conviction court denied relief.

The petitioner testified that he hired trial counsel after the public defender successfully sought a bond reduction in his case and he made bond.¹ The petitioner recalled that upon meeting with trial counsel, they agreed to a three thousand dollar representation fee. He stated that he paid trial counsel a portion of the fee each time they met for court. At some point during the representation, trial counsel sought to withdraw from representation because the petitioner had failed to pay the full amount of the agreed fee. However, the trial court did not allow the withdrawal and trial counsel remained on the case. The petitioner recalled that trial counsel presented several offers from the state, beginning with one for the maximum thirty-six-year sentence; twenty-four years; twenty-two years; and finally, twenty years which was eventually accepted. The petitioner testified that he initially did not want to accept the twenty year sentence, but he pled guilty because trial counsel warned him that without more money trial counsel could not adequately represent him at trial. He admitted that trial counsel had warned him that the case against him was strong and that with his background he would be facing a thirty-six-year sentence for the three offenses. The petitioner stated that after trial counsel informed him of the likelihood of a conviction and maximum sentence, he decided to plead because “[trial counsel] said he wasn’t going to defend me – he couldn’t defend me properly without the money.”

On cross-examination, the petitioner admitted that there was no way he could have won the case at trial based upon the videotape evidence of the controlled drug purchases and his own written confessions to the offenses. He further stated that he felt like he had no choice but to continue with trial counsel because he had already paid twelve hundred dollars toward the initial fee. He also admitted that he spoke with trial counsel “every time we c[a]me to court. We came to court a lot.” When he initially retained trial counsel, the petitioner’s main interest was to get a good deal; but when the petitioner became dissatisfied with the offers by the state, he decided to go to trial. Ultimately, the petitioner admitted that he desired to serve only ten to twelve years and was unhappy with the guilty plea to twenty years. The petitioner acknowledged that on the day of the guilty plea submission, he accepted the terms of the plea agreement sometime in the morning and waited in the courtroom all day while another trial occurred. The petitioner testified that he had all day to think about the plea and did not enter the plea until the other trial went to deliberations at approximately 5:00 that evening.

¹ We further note that the petitioner testified at the evidentiary hearing that he retained trial counsel after making bond because he “was advised that the Public Defender’s Office was taken off of the case and [he] had to get [his] own lawyer.” Post-conviction counsel clarified that “as is the custom of this Court typically, once you are able to make a bond were you then advised because you are able to make a bond you now appear to have the ability and funds to go hire counsel and that is why the Public Defender was taken off of your case?” To which the petitioner replied, “Yes, sir.” Although the issue of the petitioner’s indigency is not raised as an allegation in this proceeding and the record is therefore incomplete as to any findings of indigency, we warn trial courts that any per se policy requiring a defendant who makes bond to retain private counsel, absent an independent determination of indigency, could violate a defendant’s right to counsel. State v. Henry, 733 S.W.2d 127, 128 (Tenn. Crim. App. 1987) (“[C]ounsel should not be denied any [defendant] merely . . . because he has posted or is capable of posting bond.”).

Trial counsel testified that he had been practicing law for fifteen years and that one hundred percent of his practice was the representation of criminal defendants. He described the petitioner as:

one of the most articulate and bright clients that I have [had]. He understood completely the situation he was in. He understood the problems he had with this case because of the quantity. He knew the ramifications of his prior record. He kn[ew] that he had problems with the confession, the videos, the photos, and he was very explicit in his telling to me that all he was looking for was to beat the time down. End of story.

Trial counsel admitted that the petitioner never fully paid his representation fee and that he had sought to withdraw as counsel at one point. He added that “[o]ther than [the failure to pay the fee in full], he and I got along fine.” He denied ever telling the petitioner that he would not adequately represent him unless he received more money. Regarding the plea negotiations, trial counsel recalled that “[t]ime went by and went by and went by and, you know, there was negotiation after negotiation. The State’s position was, why would I reduce it, you know, this is a slam dunk case. I have video, I have confession, but we worked them down to 20 years.” Trial counsel recalled that the petitioner wanted only twelve years but trial counsel opined that “that just wasn’t going to happen” in this case. Trial counsel acknowledged that there may have been conversations that a trial would entail an additional fee but, since the petitioner had failed to pay even the initial fee, he did not pursue any additional money with the hope of actually receiving it. He testified that he had represented defendants without the full fee before and did it this time; he stated that the lack of full payment did not affect the representation he provided.

ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. §40-30-110(f). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-372, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel’s performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. 2068. The Strickland standard has been applied to the right to counsel under Article I,

Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989). In the context of a guilty plea as in this case, the effective assistance of counsel is relevant only to the extent that it affects the voluntariness of the plea. Therefore, to satisfy the second prong of Strickland, the petitioner must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); see also Walton v. State, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

Initially, we note that the transcript of the guilty plea submission hearing refutes the petitioner’s claim that the trial court failed to properly advise him of his right to a jury trial and his right to appeal. Additionally, the evidentiary hearing transcript reveals that post-conviction counsel decided not to pursue that claim at the evidentiary hearing, stating that “I don’t think we are going to be following – pursuing that to any degree at all, Judge. I think the transcript of the plea of guilty bears out what the Court did or did not say to the Defendant.”

As to the petitioner’s claims of ineffective assistance of counsel rendering the guilty pleas involuntary, the testimony at the evidentiary hearing does not support this allegation. Trial counsel is an experienced attorney. He negotiated a favorable plea agreement in a “slam dunk” case, as described by the state. There is no credible proof to establish that trial counsel’s representation of the petitioner was deficient. Rather, the record reflects a petitioner who is generally disgruntled with the sentence arising from his knowing, voluntary and intelligent plea. The evidence does not preponderate against the post-conviction court’s findings.

CONCLUSION

In consideration of the foregoing, the judgment of the post-conviction court denying the petition for post-conviction relief is affirmed.

D. KELLY THOMAS, JR., JUDGE